

¹ Order at 2 (Feb. 9, 2004).

Respondent argues claimant failed to prove that her head injury arose out of and in the course of her employment. Respondent argues that claimant's request for benefits should be denied due to lack of substantial and credible evidence that claimant's co-worker injured her.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing held February 4, 2004, claimant presented the medical records of five physicians, Christopher J. Ottinger, M.D., James Donley, M.D., James Applebaum, M.D., Margaret Killam, M.D. and Ethan Bickelhaupt, M.D.

During the preliminary hearing claimant testified that on Friday, September 12, 2003, "I went to the printer and it was printing and I was watching the pages come out and that's when Gloria came up behind me and struck me on both sides of my head."² When asked what happened next claimant described losing consciousness. "And when I started regaining consciousness I heard this laughing, and this laughing, and laughing. And then I heard this, "Oh, I'm sorry, and just, she just kept laughing."³ On cross-examination claimant added that when she blacked out, although she did not fall, her face hit the printer. Claimant did not mention her face hitting the printer on direct examination. In her later testimony on re-cross examination claimant was unsure whether her face hit the printer.

Q. (Ms. Pickett) Oh, no, no, no. I didn't hit the printer. When I say, "I didn't hit it," if I did hit it it wasn't so hard that it broke my nose or, you know, that I was aware of there were no marks on my face.⁴

After the incident with her co-worker claimant went back to her desk and was shaking and crying. She states she did not want to stay at work after the incident so she reported it to her supervisor and left for the day. After the incident claimant experienced blurred vision and was not driving. She attempted to come back to work the following Thursday for a couple of hours but left due to a doctor's appointment. A week after the incident claimant believed she was still doing poorly and went to see Christopher M. Ottinger, Sr., M.D.

² P.H. Trans. at 6.

³ *Id.* at 6.

⁴ P.H. Trans. at 37.

Claimant sought medical treatment on September 19, 2003 with Dr. Ottinger, who ordered a CT scan on September 24, 2003, to rule out intercranial bleeding. Dr. Ottinger noted in his chart that “concussion happened last Friday. Had trouble driving the next day (Sat) reading signs vision problems.”⁵ Dr. Ottinger’s assessment was “concussion, brief loss [of consciousness.]”⁶

According to claimant her health insurance referred her to a therapist, Jane Galvan-Colson, who in turn referred her to Dr. Donley, a psychiatrist, for medication. She eventually saw Dr. Margaret Killam who referred her on to a neurologist, James Applebaum, M.D. Claimant described to Dr. Applebaum symptoms of headaches, sleepiness, cognitive problems, difficulty walking, blurred vision, ringing in the ears, mood change and memory loss. On January 16, 2004, Dr. Applebaum ordered a followup MRI. The results of the MRI and CT scan were negative as to any evident pathology.

Dr. Applebaum told claimant she had post concussion syndrome and referred her to another psychiatrist. Claimant saw Dr. Ethan Bickelhaupt on January 5, 2004. Dr. Bickelhaupt’s clinical note of January 8, 2004 diagnosed claimant as suffering from post traumatic stress disorder (PTSD) and post-concussive syndrome which he related to the injury claimant described suffering at work.

Claimant’s co-worker, Gloria Banks, testified very differently about the incident. She said that she merely put her hands over claimant’s eyes in a “peek-a-boo” fashion and that she did not hit her on the ears. When Ms. Banks was asked if claimant passed out and fell into the printer she answered no. She said claimant immediately turned around, and said, “[y]ou better be glad I didn’t hit you. You better be glad I didn’t hit you.”⁷

Claimant’s supervisor, Rosemarry Voss, testified that claimant came into her office and was shaking and upset after the incident. But claimant only advised Ms. Voss that Ms. Bank’s had come up behind her and put her hand on her ears and had startled her. Ms. Voss asked her if she was alright and claimant stated, “[y]es, I’m fine. I’m just very upset . . . I wanted you to know about it.”⁸

The issues raised in this appeal turn primarily on the credibility of the witnesses’ testimony. Claimant’s testimony is internally inconsistent and is inconsistent with the other witnesses. It is claimant that bears the burden of proof. The Board finds that claimant has

⁵ *Id.* at Resp. Ex. C.

⁶ *Id.*

⁷ *Id.* at 43 and 44.

⁸ *Id.* at 59.

failed to prove she suffered a head injury that was caused by a co-worker with respondent on the date alleged.

The Board finds that the ALJ's Order should be affirmed. The claimant's statements to her supervisor and the testimony of the other witnesses are consistent with an unwelcome touching, but not with a forceful hit or striking blow that would cause a concussion. Claimant's testimony to the contrary is not credible.

WHEREFORE, Administrative Law Judge Kenneth J. Hursh's Order dated February 9, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

BOARD MEMBER

c: Christopher Kelsey, Attorney for Claimant
Victor B. Finkelstein, Attorney for Respondent and Westport Insurance Corp.
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director